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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

In re

CURT D. BRINSON AND MERILEE G.  
BRINSON,

Debtor(s).

WELLS FARGO BANK, NA,

Movant,

vs.

CURT D. BRINSON AND MERILEE G.  
BRINSON, Debtor(s); JOHN W. REGER,  
Chapter 7 Trustee,

Respondents.

Case No. 10-20757

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF  
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

LBR 4001-1 and 9014-1(f)(1)

DATE: June 1, 2010  
TIME: 9:30 a.m.  
CTRM: 35

501 "I" Street  
Sacramento, CA 95814

Wells Fargo Bank, NA<sup>1</sup> ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to enforce its security interest in real property generally described as 2634 N 58th St, Mesa, Arizona 85215.

<sup>1</sup> This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004

1 On or about January 13, 2010, Curt D. Brinson and Merilee G. Brinson ("Debtors") filed a  
2 voluntary petition under Chapter 7 of the Bankruptcy Code, and John W. Reger was appointed as  
3 Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtors and the  
4 bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

5 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I.**

8 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
9 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

10 **NO EQUITY**

11 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the  
12 debtor does not have any equity in the property and the property is not necessary to the debtor's  
13 effective reorganization.

14 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:  
15 § 362(d)(2) reflects congressional intent to allow creditors to  
16 immediately proceed against the property where the debtor has no  
17 equity and it is unnecessary to the reorganization, even where the  
debtor can provide adequate protection under § 362(d)(1). (Emphasis  
added).

18 Id. at 610 (emphasis added).

19 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated  
20 that in determining whether equity exists in the property for purposes of § 362(d)(2), all  
21 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from  
22 stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir.  
23 1984).

24 An appropriate cost of sale factor should also be added to determine if the debtor has any  
25 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289  
26 (Bankr. S.D. Cal. 1982).

27 On or about February 28, 2007, Debtors, for valuable consideration, made, executed and  
28 delivered to Movant a Note in the principal sum of \$90,432.00 (the "Note"). Pursuant to the Note,

1 Debtors are obligated to make monthly principal and interest payments commencing April 1, 2007,  
2 and continuing until March 1, 2037, when all outstanding amounts are due and payable. The Note  
3 provides that, in the event of default, the holder of the Note has the option of declaring all unpaid  
4 sums immediately due and payable. A true and correct copy of the Note is attached to the  
5 concurrently served and filed Exhibits to the Declaration in Support of Motion for Relief From  
6 Automatic Stay ("Exhibits") as exhibit A and incorporated herein by reference.

7 On or about February 28, 2007, the Debtors made, executed and delivered to Movant/ a  
8 Deed of Trust (the "Deed of Trust") granting Movant a security interest in real property commonly  
9 described as 2634 N 58th St, Mesa, Arizona 85215 (the "Real Property"), which is more fully  
10 described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs incurred as  
11 a result of the Debtors' bankruptcy case may be included in the outstanding balance under the Note.  
12 The Deed of Trust was recorded on March 8, 2007, in the Official Records of MARICOPA County,  
13 State of Arizona. A true and correct copy of the Deed of Trust is attached to the Exhibits as  
14 exhibit B and incorporated herein by reference.

15 Subsequently, Lender's beneficial interest in the Deed of Trust was sold, assigned and  
16 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust  
17 evidencing the Assignment of the Deed of Trust to Movant is attached to the Exhibits as exhibit C  
18 and incorporated herein by reference.

19 The obligation under the Note is in default as of, for failure to make payments to Movant. As  
20 of April 6, 2010, the total obligation due and owing under the Note is in the approximate amount of  
21 \$87,861.37, representing the principal balance of \$87,290.86, interest in the sum of \$961.20, and  
22 accumulated late charges in the amount of \$28.58, less an escrow balance in the amount of \$419.27.

23 This is an approximate amount for purposes of this Motion only, and should not be relied upon as  
24 such to pay off the subject loan as interest and additional advances may come due subsequent to the  
25 filing of the Motion. An exact payoff amount can be obtained by contacting Movant's counsel.  
26 Further, Movant has incurred additional post-petition attorneys' fees and costs in bringing the instant  
27 Motion. Moreover, the total arrears under the Note are in the approximate sum of \$1,398.90,  
28 excluding the post-petition attorneys' fees and costs incurred in filing the instant Motion.

1 **II.**

2 **RELIEF FROM STAY**

3 **LACK OF EQUITY**

4 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and  
5 Statements, the fair market value of the Property is approximately \$106,500.00. True and correct  
6 copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as  
7 exhibit C and incorporated herein by reference.

8 Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$106,500.00
Less:	
Movant's Trust Deed	\$87,861.37
Costs of Sale (8%)	<u>\$8,250.00</u>
Equity in the Property:	\$10,118.63

12  
13 As a result, there is little equity in the Property for the bankruptcy estate. Moreover, since  
14 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled  
15 to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

16 **III.**

17 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
**AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

18 **CAUSE - LACK OF ADEQUATE PROTECTION**

19  
20 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate  
21 protection of its interest in the Property.

22 Movant submits that adequate protection in this case requires normal and periodic cash  
23 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to  
24 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

25 Movant is informed and believes that Debtors are presently unwilling or unable to provide  
26 adequate protection to the Movant and there is no probability that adequate protection can be  
27 afforded to Movant within a reasonable time.

28 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.

1 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

2 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

3 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by  
4 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

5 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

6 3. Granting Movant leave to foreclose on the Real Property and to enforce the security  
7 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of  
8 the Property;

9 4. Permitting Movant to offer and provide Debtors with information re: a potential  
10 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss  
11 Mitigation Agreement, and to enter into such agreement with Debtors;

12 5. Alternatively, in the event this court declines to grant Movant the relief requested  
13 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to  
14 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust  
15 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay  
16 when due (a) the monthly installments of principal and interest, as required under the Note;  
17 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in order to  
18 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the  
19 filing of this motion;

20 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be  
21 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;  
22 and

23 7. For such other and further relief as the court deems just and proper.

24 Dated: April 28, 2010

PITE DUNCAN, LLP

25 /s/ ANNE W. HAMANN (CA SBN 254327)  
26 ANNE W. HAMANN  
27 Attorneys for WELLS FARGO BANK, NA  
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